No. 79-1144

JAN 17 1981

ALEXANDER L. STEVAS
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

TEXAS INDUSTRIES, INC.,
Petitioner,

versus

RADCLIFF MATERIALS, INC., JIMCO, INC. and OKC DREDGING, INC.,
Respondents.

On Writ of Certiorari to
The United States Court of Appeals
For the Fifth Circuit

BRIEF FOR RESPONDENTS RADCLIFF MATERIALS, INC., JIMCO, INC. and OKC DREDGING, INC.

Of Counsel:

LEMLE, KELLEHER, KOHLMEYER & MATTHEWS

CHAFFE, McCALL, PHILLIPS, TOLER & SARPY

STONE, PIGMAN, WALTHER, WITTMANN & HUTCHINSON

DANDO B. CELLINI
601 Poydras Street
New Orleans, Louisiana 70130
Telephone: (504) 586-1241
Counsel of Record for
Radcliff Materials, Inc.

JAMES A. BABST
1500 First National Bank of Commerce Building
New Orleans, Louisiana 70112
Telephone: (504) 568-1320
Counsel of Record for
Jimco, Inc.

EWELL P. WALTHER, JR.
STEPHEN H. KUPPERMAN
1000 Whitney Bank Building
New Orleans, Louisiana 70130
Telephone: (504) 581-3200
Counsel of Record for
OKC Dredging, Inc.

SCOFIELDS' QUALITY PRINTERS, P. O. BOX 53096, N. O., LA. 70153 · 504/822-1611

LISTING OF AFFILIATED CORPORATIONS

In accordance with Rule 28.1 of the Rules of this Court, the following is a listing of the parent companies, subsidiaries (except wholly owned subsidiaries) and affiliates of the respondents herein:

Radcliff Materials, Inc.

Dravo Corporation
Southern Industries Corporation
May Machinery Company
Round Rock Lime Company
SI Lime Company
SI Minerals, Inc.
Southern Stone Company, Inc.
Tideland Industries, Inc.

OKC Dredging, Inc.

OKC Corporation
Business Jet Service, Inc.
Compania Humboldt, C.A.
Inlet Petroleum UK Corporation
Inlet Petroleum (Caledonian) Limited
OKC Development Corporation
OKC Exploration Inc.
OKC Petroleum International, Inc.
OKC Realty, Inc.

Jimco, Inc.

None

TABLE OF CONTENTS

Page

Listing of Affiliated Corporations i

Table of Authorities iii

Statement of the Case 2

Summary of the Argument 4

Argument 7

I. The Rule Against Contribution Under the Antitrust Laws is Based Upon Sound Public Policy 11

II. Creation of a Right of Contribution Among Coconspirators Would Exacerbate Intolerably the Complexities of Antitrust Litigation 24

III. Judicial Action to Create a Right of Contribution Among Coconspirators is Inappropriate 40

Conclusion 45

TABLE OF AUTHORITIES

Cases:

Alabama v. Blue Bird Body Co., No. 75-23-N (M.D. Ala. 1979) 16

Bailey v. Bussing, 28 Conn. 455 (1859) 11

Best v. Yerkes, 247 Iowa 800, 77 N.W.2d 23 (1956) 11

PREVIOUS PAGE WAS BLANK

TABLE OF AUTHORITIES (Continued)

Page

Cackling Acres v. Olson Farms, Inc., 541 F.2d 242 (10th Cir. 1976), *cert. denied*, 429 U.S. 1122 (1977) 38

City of Louisville v. Louisville Ry. Co., 156 Ky. 141, 160 S.W. 771 (1913) 12

Columbia Pictures Industries, Inc. v. Schneider, 435 F.Supp. 742 (S.D.N.Y. 1977), *aff'd*, 473 F.2d 1288 (2d Cir. 1978) 18

In re Corrugated Container Antitrust Litigation, 84 F.R.D. 40 (S.D. Tex. 1979), *aff'd* 606 F.2d 319 (5th Cir. 1979) 25

Cotton v. Hinton, 559 F.2d 1326 (5th Cir. 1977) 18

Edmonds v. Compagnie Generale Transatlantique, 433 U.S. 256 (1979) 41

El Camino Glass v. Sunglo Glass Co., 1977-1 Trade Cas. ¶ 61,533 (N.D. Cal. 1976) 16,26-27

Fidelity & Casualty Co. v. Chapman, 167 Or. 661, 120 P.2d 223 (1941) 11

Getter v. R. G. Dickinson & Co., 336 F.Supp. 559 (S.D. Iowa 1973) 27

Gobble v. Bradford, 226 Ala. 517, 147 So. 619 (1933) 11

Halcyon Lines v. Haenn Ship Ceiling and Refitting Corp., 343 U.S. 282 (1952) 40,41,42

TABLE OF AUTHORITIES (Continued)

Page

Illinois Brick Co. v. Illinois, 431 U.S. 720 (1977). 16,18,39

Little Rock School District v. Borden, Inc., 1980-1 Trade Cas. ¶ 63,059 (E.D. Ark. 1979) 14,25

Merryweather v. Nixan, 8 Term Rep. 186, 101 Eng. Rep. 1337 (K.B. 1799) 11

National Railroad Passenger Corp. v. National Ass'n of Railroad Passengers, 414 U.S. 453 (1973) 42

Newark Motor Inn Corp. v. Holiday Inns, Inc., 1980-2 Trade Cas. ¶ 63,465 (D.N.J. 1980) 26,31

Olson Farms, Inc. v. Safeway Stores, Inc., 1977-2 Trade Cas. ¶ 61,698 (D. Utah), *aff'd*, 1979-2 Trade Cas. ¶ 62,995, *en banc rehng. granted*, (10th Cir. 1979) 17,20,43,45

Perma Life Mufflers, Inc. v. International Parts Corp., 392 U.S. 134 (1968) 21,22,23,28

Piper Aircraft Co. v. Chris-Craft Industries, Inc., 430 U.S. 1 (1977) 42

Professional Beauty Supply, Inc. v. National Beauty Supply, Inc., No. 4-77-110 (D. Minn. 1978), *rev'd*, 594 F.2d 1179 (8th Cir. 1979) ..... passim

Reiter v. Sonotone Corp., 442 U.S. 330 (1979) 46

Sabre Shipping Corp. v. American President Lines, Ltd., 298 F.Supp. 1339 (S.D.N.Y. 1969) .. 15,17,43

TABLE OF AUTHORITIES (Continued)

Page

Solomon v. Houston Corrugated Box Co., 526 F.2d 389 (5th Cir. 1976) 32

Thweate v. Jones, 22 Va. (1 Rand) 328 (1823) 12

Transamerica Mortgage Advisors, Inc. v. Lewis, 411 U.S. 11 (1979) 42

Union Stock Yards Co. v. Chicago, Burlington and Quincy R., 196 U.S. 217 (1905) 11

United States Dental Inst. v. American Association of Orthodonists, 396 F.Supp. 565 (N.D. Ill. 1975) . 32-33

United States v. Reliable Transfer Co., 421 U.S. 397 (1975) 41

United States v. Topco Associates, Inc., 405 U.S. 596 (1972) 44

United States v. United States Gypsum Co., 438 U.S. 422 (1978) 33

Van Brockhorst v. Safeco Corp., 529 F.2d 943 (9th Cir. 1976) 18

Weight Watchers of Philadelphia, Inc. v. Weight Watchers International, Inc., 455 F.2d 770 (2d Cir. 1972) 18

Wilson P. Abraham Construction Corp. v. Texas Industries, Inc., No. 75-2820 (E.D. La. 1977), *aff'd*, 604 F.2d 897 (5th Cir. 1979) ..... *passim*

TABLE OF AUTHORITIES (Continued)

Page

Statutes:

15 U.S.C. 1, Sherman Act 20,33

15 U.S.C. 15, Clayton Act 8

15 U.S.C. 16, 26, Clayton Act 13

Antitrust Procedural Act of 1980, S. 390, 96th Cong. 2d Sess. (1980) 32

Other Authorities:

Address by Attorney General Benjamin Civiletti, American Bar Association, Section of Litigation (Chicago, November 10, 1979) 46

18 Am. Jur. 2d *Contribution* Section 34 12

1 Areeda and Turner, *Antitrust Law* (1978) 5

CCH Trade Regulation Reports No. 462, dated November 3, 1980 45-46

Cooley, *Law of Torts* (3d ed. 1906) 12

Floyd, *Contribution Among Antitrust Violators: A Question of Legal Process*, 2 B. Y. U. L. Rev. 1 (to be published in February 1981) 19,31

Friendly, *The Gap in Lawmaking — Judges Who Can't and Legislatures Who Won't*, 63 Col. L. Rev. 787 (1963) 44

TABLE OF AUTHORITIES (Continued)

Page

Manual for Complex Litigation (1977) 27

Prosser, *Handbook of the Law of Torts* (4th ed. 1971) 31

Restatement of Restitution (1937) 12,13

Schwartz, Simpson, Arnold, *Contribution in Private Actions Under the Federal Antitrust Laws*, 33 S.W.L.J. 779 (1979) 33

Sellers, Contribution in Antitrust Damage Actions, 24 Vill. L. Rev. 829 (1979) 38

Sullivan, *Antitrust* (1977) 33

Syverud, *Contribution and Antitrust Theory*, 78 Mich. L. Rev. 890 (1980) 19

No. 79-1144

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1980

TEXAS INDUSTRIES, INC.,
Petitioner,

versus

RADCLIFF MATERIALS, INC., JIMCO, INC.
and OKC DREDGING, INC.,
Respondents.

On Writ of Certiorari to
The United States Court of Appeals
For the Fifth Circuit

BRIEF FOR RESPONDENTS RADCLIFF MATERIALS, INC., JIMCO INC. and OKC DREDGING, INC.

STATEMENT OF THE CASE

Petitioner and respondents are manufacturers of ready-mix concrete in New Orleans, Louisiana.

In January of 1973, petitioner and respondents became involved in criminal proceedings arising out of indictments handed down by a Grand Jury sitting in the United States District Court for the Eastern District of Louisiana. The indictments alleged that petitioner Texas Industries, Inc. and one of its employees, respondent Radcliff Materials, Inc. and one of its employees, Jahncke Services, Inc. (a corporation whose assets and liabilities were subsequently acquired by respondent OKC Dredging, Inc.) and one of its employees, and respondent Jimco, Inc. engaged in an unlawful combination and conspiracy to raise and stabilize the price of ready-mix concrete in the New Orleans area, in violation of Section 1 of the Sherman Act, from about the middle of 1968 until sometime in 1970. These criminal proceedings were ultimately concluded in 1973 with convictions based upon *nolo contendere* pleas by each of the defendants.

Wilson P. Abraham Construction Corporation ("Abraham") is a Louisiana company engaged in the business of building residential and commercial structures. Abraham purchased ready-mix concrete from petitioner Texas Industries, Inc., but not from any of the respondents (J.A. 24-5).

On September 8, 1975, Abraham filed suit against petitioner Texas Industries, Inc. and Frank T. Dooley,

one of the petitioner's former employees, to recover damages for alleged overcharges paid by it to petitioner on purchases of ready-mix concrete from petitioner. Abraham's complaint avers that such overcharges were the result of a combination and conspiracy among petitioner, Dooley and their coconspirators to raise and stabilize the price of ready-mix concrete in the New Orleans area, in violation of Section 1 of the Sherman Act (J.A. 6).

Interrogatories filed by petitioner, and answers thereto, revealed that petitioner's alleged coconspirators, who were not named in Abraham's complaint, included Radcliff Materials, Inc., Jahncke Services, Inc. and Jimco, Inc. They also revealed that Abraham never purchased any ready-mix concrete from these alleged coconspirators (J.A. 21, 24-5).

On March 2, 1977, petitioner Texas Industries filed a third-party complaint against respondents Radcliff, Jimco and OKC, seeking contribution from respondents in the event it was found liable to Abraham in the main demand.

Each of the third-party defendants filed motions pursuant to Rule 12(b)(6) seeking dismissal of the third-party complaint on the ground that no right of contribution exists among alleged antitrust coconspirators under the antitrust laws of the United States.

On October 4, 1977, the United States District Court for the Eastern District of Louisiana entered a Minute Entry (J.A. 46) granting the motions to dismiss filed by the third-party defendants.

On March 29, 1978, the district court entered an order expressly determining that there was no just reason for delay in the entry of judgment until the final determination of all issues in this action, and directing the clerk to enter the October 4, 1977 Minute Entry as a final judgment. Pursuant to this order, final judgment was entered on March 29, 1978, dismissing Texas Industries' third-party complaint with prejudice.

On April 5, 1978, Texas Industries timely filed its Notice of Appeal from the judgment of the district court. On October 16, 1979, the Fifth Circuit Court of Appeals handed down its opinion affirming the district court's dismissal of petitioner's third-party complaint, and holding that no right to contribution exists under the federal antitrust laws. A petition for rehearing was denied on November 29, 1979, and judgment of the Fifth Circuit was entered on December 26, 1979 (J.A. 50).

SUMMARY OF ARGUMENT

Petitioner Texas Industries is here to seek a fundamental change in the federal antitrust laws: it asks this Court to create a whole new class of claims for contribution among antitrust coconspirators. Arrayed against petitioner's position are the dictates of sound public policy, the realities of managing complex antitrust litigation and the overwhelming weight of judicial authority.

Texas Industries attempts to circumvent these considerable obstacles by contending that "fundamental fairness" mandates creation of a contribution cause of

action. Professors Areeda and Turner have noted that "[a]s a goal of antitrust policy, 'fairness' is a vagrant claim applied to any value that one happens to favor." 1 Areeda and Turner, ANTITRUST LAW §109 at 21 (1978). It would be difficult indeed to find a more apt illustration of the astuteness of this observation than the case at bar. Creation of a contribution remedy would not only allow Texas Industries to escape all liability in this case even if it were found liable to the plaintiff in the main demand, but it would also actually permit Texas Industries to retain a very substantial portion of any illegal profits it received from the plaintiff.

Of course, situations can arise where, unlike here, application of the rule against contribution seems harsh. But that simply demonstrates the necessity for evaluating the rule against contribution in the context of the broad public policy considerations and practical considerations that gave rise to it, instead of the context of individual factual circumstances.

The rule against contribution has its roots in society's unwillingness to put the machinery of the courts in motion to adjust equities between persons who have been engaged in unlawful conduct. In view of the present burdens on the federal court system, the policy of preserving judicial resources for redress of injuries sustained by those who abide by the law is even more necessary today than it was when the policy was first established. And this policy is particularly appropriate in the context of judicial administration over enforcement of the antitrust laws.

Allowing coconspirators to assert contribution claims would rob the antitrust plaintiff of control over his case, by allowing defendants to bring additional parties whom the plaintiff never chose to sue into the litigation, in an effort to reduce the potential damages the defendants would be liable for in the event of an adverse judgment.

Contribution would frustrate the strong judicial policy favoring settlement. No defendant would ever settle an antitrust case if he knew he could find himself back in the suit as a third-party defendant.

Contribution would also undermine the deterrent effect of the antitrust laws by permitting violators to spread the "losses" occasioned by private antitrust treble damage awards, thereby reducing the risks involved in engaging in anticompetitive practices.

In addition to these policy considerations, a whole host of practical considerations militate against creation of a contribution cause of action. Contribution would mean there would be many more parties in every antitrust case. New contribution pleadings, claims and discovery requests would exacerbate manageability problems at the pretrial stage, and it would be even worse at trial. Employment of joint defense efforts in processing complex antitrust litigation would become a thing of the past. The difficult task of apportioning liability among coconspirators would pose dilemmas that beleaguered trial courts could readily do without. In sum, contribution in antitrust cases would

impose overwhelming complexities and costs upon the federal court system.

Finally, it would be inappropriate to create a right of contribution among antitrust coconspirators by judicial action in any event. Due to the major impact creation of such a cause of action would have on the enforcement and administration of the antitrust laws, a broad and empirical study of the complex social and economic effects of contribution should be undertaken before any change in the present rule is contemplated. As this Court's precedents make clear, Congress is the appropriate forum for a study of this kind. Petitioner's demands should be referred to Congress.

ARGUMENT

At the heart of petitioner's argument for creation of a contribution cause of action in antitrust cases is the contention that "fundamental fairness" mandates such a result. Petitioner's Brief 11-15. Indeed, petitioner views this proposition as so self-evident that it dismisses inquiry into the question of whether there *should* be contribution as superfluous:

> When a question of such fundamental fairness is considered, however, the more appropriate way to confront the problem should be to ask why should it *not* be a recognized remedy.
>
> Petitioner's Brief 7.

Can it be, as petitioner implies, that the rule against contribution survives merely as an historical anach-

ronism, without support in either logic or native sense? Can it be that eighteen of the nineteen federal appellate and district courts that have independently considered the rule against contribution in antitrust cases have closed their eyes to fundamental fairness and affirmed the rule just out of an overzealous devotion to the principle of *stare decisis*? Plainly not.

"Fundamental Fairness"

Fundamental fairness does *not* compel the result petitioner seeks, and nothing better illustrates this point than the facts of the very case now before the Court. Petitioner Texas Industries was one of four companies indicted in New Orleans for allegedly conspiring to fix prices on ready-mix concrete. Of the four, Texas Industries was the *only one* that sold any concrete to Abraham, the original plaintiff in this action. Thus, if there was a conspiracy and Abraham was overcharged for concrete, *all* such overcharges went into the coffers of Texas Industries. None of the other three companies received a nickel's worth of profits from overcharges to Abraham. Abraham accordingly instituted suit against Texas Industries alone, asserting that Texas Industries had overcharged it in the amount of $200,000, and seeking treble that amount, or $600,000, in total damages, pursuant to Section 4 of the Clayton Act, 15 U.S.C. §15.[1] Complaint, ¶¶ 7.2 & 12.1, J.A. 7 & 10.

---

1 Although Petitioner's Brief argues that the rule against contribution leaves open the possibility that some coconspirators may not be sued by a plaintiff because of collusion between the plaintiff and such coconspirators, Texas Industries does not and cannot

Texas Industries now asks this Court to create a contribution remedy which would divide Abraham's damages *per capita* among the four alleged coconspirators. Petitioner's Brief 22-7. If such a remedy were created, and if Abraham were to prove its claim against Texas Industries in the full amount of $600,000, Texas Industries' share of the damages would come to only $150,000, or $50,000 *less* than the $200,000 it got from Abraham in illegal overcharges. Texas Industries would come out $50,000 *ahead* on the whole deal! Here is how it would work:

Abraham's actual damages of $200,000 are trebled pursuant to Section 4 of the Clayton Act, resulting in total recoverable damages for Abraham of $600,000:

$$\begin{array}{r} \$200{,}000 \text{ actual damages} \\ \times 3 \\ \hline \$600{,}000 \text{ total damages} \end{array}$$

Under petitioner's *per capita* contribution theory, Abraham's total damages are then divided by the number of coconspirators to determine each coconspirator's share of the total damages:

$600,000	total damages
÷4	number of coconspirators
$150,000	each coconspirator's share of total damages

---

suggest that there has been any collusion in this case. On oral argument before the Fifth Circuit, counsel for petitioner readily conceded that there has been no collusion between Abraham and respondents.

Texas Industries' total illegal overcharges to Abraham, less its *per capita* share of total damages, equals its net illegal profit:

$200,000	illegal overcharges by Texas Industries
-150,000	Texas Industries' *per capita* share of total damages
$ 50,000	net illegal profit to Texas Industries

By spreading the cost of making restitution to Abraham among the three other coconspirators, who received *none* of the profits from overcharges to Abraham, Texas Industries would not only escape all liability for its overcharges to Abraham but would also actually wind up getting to *keep* fully one quarter of the illegal overcharges it received from Abraham.

Of the myriad descriptive terms that could be used to characterize Texas Industries' proposal, "fundamental fairness" is not among those that leap to the fore.

And yet the courts that have considered the rule against contribution in antitrust cases have recognized that, under certain circumstances, its application could appear to produce a harsh result. The opinions on this issue have therefore devoted considerable attention to setting forth the sound public policy considerations and the sound practical considerations which gave rise to the rule against contribution, and to explaining why these considerations have as much, if not more, vitality today than they did when the rule was first devised.

I. The Rule Against Contribution Under the Antitrust Laws is Based Upon Sound Public Policy

Since the case of *Merryweather v. Nixan*, 8 Term Rep. 186, 101 Eng. Rep. 1337 (K.B. 1799), common law courts have consistently held that no right of contribution exists among intentional tortfeasors. In the landmark decision of *Union Stock Yards Co. v. Chicago, Burlington and Quincy R.*, 196 U.S. 217 (1905), this Court declared:

> [T]he general principle of law is well settled that one of several wrongdoers cannot recover against another wrongdoer, although he may have been compelled to pay all the damages for the wrong done.
>
> 196 U.S. at 224.

This principle is rooted in society's unwillingness to put the machinery of the courts in motion to adjust equities between persons who have been engaged in unlawful action, or to relieve a culpable wrongdoer, even as against another wrongdoer equally liable, from the consequences of his unlawful act. *Best v. Yerkes*, 247 Iowa 800, 77 N.W.2d 23 (1956); *Gobble v. Bradford*, 226 Ala. 517, 147 So. 619 (1933); *Bailey v. Bussing*, 28 Conn. 455 (1859). By leaving such parties in the position in which it finds them, the law protects the pecuniary interests of the state and the rights of other litigants to unimpeded justice in the courts. *Fidelity & Casualty Co. v. Chapman*, 167 Or. 661, 120 P.2d 223 (1941). Moreover,

this principle has been traditionally regarded as an effective method of deterring potential wrongdoers from combining to commit wrongs, by imposing the risk upon each of responsibility for all the consequences of such wrongs. *City of Louisville v. Louisville Ry.*, 156 Ky. 141, 160 S.W. 771 (1913); *Thweate v. Jones*, 22 Va. (1 Rand) 328 (1823); *see generally* T. Cooley, LAW OF TORTS §171 (3d ed. 1906); 18 Am. Jur.2d §34.

The policy of preserving judicial resources for redress of injuries sustained by those who abide by the law is even more necessary today than it was two hundred years ago when the policy was first established. The public has too great an interest in the speedy and unhampered operation of the legal system to permit those who engage in unlawful actions to preempt judicial resources for enforcement of claims among themselves. Thus, the drafters of modern model legislation on the subjects of restitution and contribution have incorporated into such statutes general prohibitions against contribution among intentional tortfeasors. For example, the American Law Institute's Restatement of Restitution contains the following provision:

> Section 140. Criminal And Other Wrongful Conduct.
>
> A person may be prevented from obtaining restitution for a benefit because of his criminal or otherwise wrongful conduct in connection with the transaction on which his claim is based.
>
> Restatement of Restitution §140 (1937).

In the Introductory Note to Chapter 3 of the Restatement, this provision is explained in the following way:

> [A] person who has violated the law should not invoke it to obtain relief with reference to the same transaction; the burden to the public inseparable from litigation should be borne only for those who have obeyed the law; the denial of restitution will tend to prevent further misconduct.
>
> Restatement of Restitution, Introductory Note, Chap. 3 at 386 (1937).

Similarly, the Uniform Contribution Among Tortfeasors Act, which creates a right of contribution in negligence cases, nevertheless expressly provides that:

> There is no right of contribution in favor of any tortfeasor who has intentionally (wilfully or wantonly) caused or contributed to the injury.
>
> Uniform Contribution Among Tortfeasors Act, Section 1(b).

Nothing in the antitrust laws suggests the general rule against contribution was not intended to apply to antitrust cases. There is no provision for contribution in any antitrust statute, the only persons having a cause of action under such statutes being those injured by antitrust violations. 15 U.S.C. §§16, 26. Accordingly, with the exception of a divided panel of the Eighth Circuit in *Professional Beauty Supply, Inc. v. National Beauty Supply, Inc.*, 594 F.2d 1179 (8th Cir. 1979) (*"Professional Beauty"*) and an Arkansas federal district

court that was bound by the *Professional Beauty* decision,[2] *every* federal appellate and district court that has been asked to create a cause of action for contribution in an antitrust case has refused to do so.

Among the public policy grounds that have been advanced by these courts for rejecting contribution in an antitrust context are the following: (i) contribution would rob the plaintiff of control over his case; (ii) contribution would discourage settlements; and (iii) contribution would diminish the deterrent effect of the antitrust laws.

Plaintiff's Control of the Case

Abraham, the original plaintiff in this matter, now has a fairly simple and straightforward case to prosecute: it claims it was overcharged for concrete, and it has sued the company it says overcharged it to recover its damages. If Texas Industries is permitted to bring three other companies that never did business with Abraham into the litigation, it is obvious the proceedings will become significantly more complicated. Should these companies, in turn, choose to implead some or all of the sixteen other concrete suppliers in the New Orleans area — some of which did business with Abraham, and some of which did not — the proceedings would soon bear no resemblance at all to the uncomplicated claim Abraham set out to make.

---

2 *Little Rock School Dist. v. Borden, Inc.*, 1980-1 Trade Cas. ¶ 63,059 (E.D. Ark. 1979).

Yet if contribution were permitted, every alleged coconspirator would have a compelling incentive to find some ground, no matter how flimsy, to bring as many additional parties into the litigation as possible, since each new coconspirator that is impleaded represents a potential reduction of the damages each coconspirator already in the case would be liable for in the event of a judgment.

The danger that, with contribution, a plaintiff could lose all control of the litigation it instituted was recognized in *Sabre Shipping Corp. v. American President Lines, Ltd.*, 298 F.Supp. 1339 (S.D.N.Y. 1969), the first case which presented an exhaustive analysis of the contribution problem in an antitrust context. The court there observed that:

> The private antitrust suit serves an important public purpose of presenting "an ever-present threat to deter anyone contemplating business behavior in violation of the antitrust laws." (*Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134, 88 S.Ct. 1981, 20 L.Ed.2d 982.) If one or two defendants sued by a plaintiff, who alleged in this case it has been driven out of business, could turn around and implead all other persons directly and indirectly involved in the alleged conspiracy, it could well spell death to the plaintiff's suit and thus thwart the statutory purpose. Plaintiff's choice to sue those of the defendants it considers most culpable or most capable of making him whole

> would be totally nullified, and control of his action would be taken out of his hands.
>
> 298 F.Supp. at 1346.

Even the Eighth Circuit opinion in *Professional Beauty*, which chose to create a right of contribution among co-conspirators, was forced to acknowledge that the fear that "contribution would interfere with the plaintiff's ability to maintain control of his lawsuit . . . is indeed a legitimate one. . . ." 594 F.2d at 1184. Other courts, including the appellate court below, have likewise acknowledged this important consideration. *Wilson P. Abraham Construction Corp. v. Texas Industries, Inc.*, 604 F.2d 897 (5th Cir. 1979); *Alabama v. Blue Bird Body Co.*, No. 75-23-N (M.D. Ala. June 22, 1979); *El Camino Glass v. Sunglo Glass Co.*, 1977-1 Trade Cas. ¶ 61,533 (N.D. Cal. 1976).

These courts have also pointed out an additional but related concern. There is a long-standing policy of encouraging private antitrust litigation under Section 4 of the Clayton Act because of its importance as a "weapon of antitrust enforcement." *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977). Loss of control by the plaintiff of his case as a result of contribution would undermine this important policy by deterring private plaintiffs of relatively limited means from bringing or maintaining a meritorious suit. Commenting on this problem, Judge Hanson in his dissenting opinion in the *Professional Beauty* case made the following observations:

> It is not difficult to conceive of many circumstances in which the original plaintiff may simply be overwhelmed by embroilment in a lawsuit of a scope and size it never contemplated and is ill-equipped to handle. Aware that litigation may spiral out of their control, it is foreseeable that some plaintiffs will forego a legitimate cause of action. Although district courts have the power to superintend complex litigation, the multiplication of issues and parties must, nevertheless, be dealt with. The chilling effect on the incentive to bring or pursue a lawsuit is unlikely to be diminished by the mere possibility of the favorable uses of district court discretion.
>
> *Professional Beauty*, 594 F.2d at 1190 (Hanson, J., dissenting in part), *quoted in part with approval in Wilson P. Abraham Construction Corporation v. Texas Industries, Inc.*, 604 F.2d at 905 and *Olson Farms, Inc. v. Safeway Stores, Inc.*, 1979-2 Trade Cas. ¶ 62,995 at 79,703 (10th Cir. 1979).

Settlement

One of the most obvious and significant problems with permitting contribution claims was succinctly stated by the court in *Sabre Shipping Corp. v. American President Lines, Ltd.*, 298 F.Supp. 1339, 1346 (S.D.N.Y. 1969): "no defendant would settle . . . if he was to find himself back in the suit as a third party defendant." 298 F.Supp. at 1346. Settling defendants demand finality; they want to know that payment of the settlement sum puts the litigation behind them once and for all.

Creation of a contribution remedy would rob settlements of such finality, unless all defendants could agree on a joint settlement with the plaintiff. But if even one defendant wished to try the case, all the other defendants would be forced to litigate it as well.

Such a result is clearly unacceptable, in view of the strong public interest in promoting settlements. *Cotton v. Hinton*, 559 F.2d 1326, 1330-31 (5th Cir. 1977); *Van Bronkhorst v. Safeco Corp.*, 529 F.2d 943, 950 (9th Cir. 1976); *Columbia Pictures Industries, Inc. v. Schneider*, 435 F.Supp. 742, 747 (S.D.N.Y. 1977), *aff'd*, 473 F.2d 1288 (2d Cir. 1978); *Weight Watchers of Philadelphia Inc. v. Weight Watchers International, Inc.*, 455 F.2d 770, 773 (2d Cir. 1972).

Deterrence

One of the primary objectives of the antitrust laws is the deterrence of future violations. *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977). Both the Eighth Circuit in the *Professional Beauty* decision and the Fifth Circuit in the instant case considered the effects of the rule against contribution on the policy of deterrence. Candidly admitting that "the question of deterrence actually cuts both ways," the Eighth Circuit nevertheless concluded that on balance a rule allowing contribution would provide a greater deterrent than does the present no-contribution rule. 594 F.2d at 1185.

That conclusion ignores the realities of the business world. The deterrent effect of the antitrust laws must be assessed, not after the fact, but at the time the pro-

hibited action is contemplated. From this vantage it is clear that "a real threat of liability exists for all participants in the illegal scheme — any one of them [can be] selected as the defendant in the plaintiff's action." *Wilson P. Abraham Construction Corp. v. Texas Industries, Inc.*, 604 F.2d at 903 n. 11; *see also* Floyd, *Contribution Among Antitrust Violators: A Question of Legal Process*, 1980-2 B.Y.U.L. Rev. (to be published in February 1981).

In the instant case, the Fifth Circuit concluded that the very possibility of imposition of sole liability *enhances* the deterrent effect on potential violators:

> The chance that a participant may be faced with a full judgment is more likely to discourage anticompetitive conduct than would ensuring that each participant pays only some fair share. Allowance of contribution in effect ensures that the burden upon a particular defendant would be ameliorated by a division of liability.
>
> 604 F.2d at 901.

The Fifth Circuit substantiated its conclusion by relying upon prevailing economic theory, which holds that businessmen are "risk-averse": they are deterred more by a slight prospect of a large loss than by the strong prospect of a small loss. 604 F.2d at 901 n. 8. Even in commentary supporting *Professional Beauty's* decision to create a contribution cause of action in antitrust cases, it has been conceded that "the Fifth Circuit has the better of the deterrence argument." Syverud, *Contribution and Antitrust Theory*, 78 Mich. L. Rev. 890, 910 (1980).

Indeed, some courts have cautioned that the possibility of spreading losses attributable to treble damage awards among all antitrust conspirators may actually encourage antitrust violations. *Wilson P. Abraham Construction Corp. v. Texas Industries, Inc.*, 604 F.2d at 905; *Olson Farms, Inc. v. Safeway Stores, Inc.*, 1979-2 Trade Cas. at 79,703. Consider, as an example, an industry with a dozen competing companies. One of these companies is clearly dominant, with 45% of the market, and the other eleven each have 5% of the market. With *per capita* contribution, simple arithmetic shows it would make eminent good sense, from a profit maximization point of view, for the dominant company to urge a price-fixing scheme upon its competitors. Assuming the competitors went along (either out of fear of ruinous price cutting by the dominant company if they refused, or out of simple greed, or out of a combination of the two), the dominant company would reap 45% of the illegal profits and would only be liable for a little over 8%, trebled, if the conspiracy were discovered. If the conspiracy earned $100,000,000 in overcharges, the dominant company's share would be $45,000,000. Its maximum liability *after* trebling under a *per capita* rule would be just under $25,000,000. Even assuming criminal prosecution for the offense and imposition of the maximum criminal fine of $1,000,000 under 15 U.S.C. §1, the company would still retain $24,000,000 in illegal profits — a very substantial incentive to combine and conspire in violation of the antitrust laws.

Contribution and the Perma Life *Decision*

In the face of the foregoing vital public policy considerations that militate against contribution, petitioner nevertheless maintains that permitting contribution would not be inconsistent with antitrust policy, and it grounds this position upon a convoluted interpretation of the meaning of *Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134 (1968).

In *Perma Life*, this Court held that the doctrine of *in pari delicto* did not bar a dealer who had been forced by his supplier to participate in a price-fixing agreement from bringing an antitrust action against his supplier. Petitioner takes the view that this decision entirely eliminated *in pari delicto* as a defense to an antitrust action. On the other hand, the Fifth Circuit in the instant case concluded, after a lengthy analysis of *Perma Life*, that the decision was directed to situations where plaintiffs are required by economic pressures to accept an illegal agreement, and that some aspects of the *in pari delicto* doctrine should be retained under the antitrust laws. *Wilson P. Abraham Construction Corp. v. Texas Industries, Inc.*, 604 F.2d at 902.

Petitioner reurges it own interpretation of *Perma Life* before this Court, and then builds upon it by maintaining that it would be inconsistent to permit a plaintiff with unclean hands to prosecute an antitrust action while denying a defendant the right to prosecute a contribution claim against his coconspirators:

> In thus rejecting *in pari delicto* as a defense to [an] antitrust claim, the Court made it clear that mere participation in an illegal scheme would not bar the participant from recovering three times the damages he sustained in the course of that participation.
>
> * * *
>
> If, as this Court stated in *Perma Life Mufflers*, the law encourages a suit by one "no less morally reprehensible than the defendant" in order to "further the overriding public policy in favor of competition", it is difficult to perceive any rationale that would support a rule denying petitioner the right to seek contribution in a situation where it finds itself the only party sued.
>
> Petitioner's Brief 21-22.

The rationale behind the rule is not so difficult to perceive as petitioner suggests. Deterrence was the motivating factor behind the *Perma Life* holding. As Texas Industries itself points out to this Court, *Perma Life* stresses that "the purposes of the antitrust laws are best served by insuring that the private action will be an ever-present threat *to deter anyone contemplating business behavior in violation of the antitrust laws.*" 392 U.S. at 139 (emphasis added), Petitioner's Brief 16 & 20.

Would this deterrence objective have been served in *Perma Life* if, in addition to denying the *in pari delicto* defense, this Court had accepted the argument petitioner advances here, and had also created a contribution remedy as the natural concomitant of the Court's hold-

ing on *in pari delicto?* Obviously not; the result would have been ludicrous in that case. The defendant supplier would not have been able to bar the plaintiff dealer's suit on the ground that the dealer participated in the conspiracy, but it *would* have been able to reduce its liability to the plaintiff dealer by asserting a contribution claim based upon the dealer's participation in the conspiracy.

And in some situations — such as the one now before the Court — contribution can do much more than just reduce the liability of the defendant. It can actually permit the defendant to escape liability altogether, and even to *keep* some of the illegal profits it received from the plaintiff. Petitioner Texas Industries would find itself in exactly that happy position if its claims for contribution were recognized by this Court.

The deterrence objective behind *Perma Life* would not even appear to countenance such a result, let alone compel it. The holding in *Perma Life* is intended to encourage suits by persons who have *standing* to sue under Section 4 of the Clayton Act; that is, *persons injured* in their business or property by antitrust violations. To cite this case for the proposition that it encourages those who are *liable* under Section 4 of the Clayton Act to escape liability by asserting contribution claims is to stand antitrust policy on its head.

For the reasons set forth above, sound antitrust policy simply cannot accommodate petitioner's proposed contribution remedy.

For other reasons that are just as compelling, antitrust practice cannot accommodate it, either.

II. Creation of a Right of Contribution Among Coconspirators Would Exacerbate Intolerably the Complexities of Antitrust Litigation

The Eighth Circuit in *Professional Beauty* expressed seemingly unbounded confidence in the abilities of trial courts to resolve the practical problems contribution would cause, with statements such as these:

> Without downplaying the seriousness of this fear [that contribution would interfere with the plaintiff's ability to maintain control of his lawsuit], we are confident that such problems can be avoided by the district court's prudent use of its power to sever where necessary to insure justice.
>
> * * *
>
> The problem of how to treat a joint tortfeasor who has settled in good faith is not present in this case. However, in the proper case the court should be able to fashion a rule of contribution which will protect the rights of settling defendants.
>
> * * *
>
> We reemphasize that district courts have the ability to sever issues and parties if the need arises.
>
> * * *
>
> We do not hold that contribution is available to all violators of the antitrust laws, regardless of the

> flagrancy of the conduct of the party seeking contribution. The decision of whether a particular party is entitled to contribution is best left to the trier of fact upon consideration of all of the circumstances of a case . . . .
>
> 594 F.2d at 1184-6.

It is interesting to note that the trial courts which have been confronted with the contribution issue have not been nearly so sanguine about their capacities to cope effectively with such problems. Only one such trial court was willing to grant contribution, and it did so only because it was in the Eighth Circuit and considered itself bound by the *Professional Beauty* decision. *Little Rock School Dist. v. Borden, Inc.*, 1980-1 Trade Cas. ¶ 63,059 (E.D. Ark. 1979). The other thirteen trial courts all denied contribution, and the increased complexities of administering such a rule was of major concern to these courts. Judge Singleton made this clear in his opinion in *In re Corrugated Container Antitrust Litigation*, 84 F.R.D. 40 (S.D. Tex. 1979):

> [C]omplications to the efficient management of a suit such as this would arise from the processing of the many possible crossclaims and impleader actions and from the fact that joint defense efforts, with their savings in court, staff, and attorney time, would be hindered or deterred altogether. The court has recently completed the trial of *United States of America v. International Paper, et al*, and *United States of America v. Boise Cascade, et al.*, D.C., 457 F.Supp. 571; those cases involved the prosecution

> of nine defendants with well-coordinated joint defense efforts. The trial lasted approximately fifteen weeks. It is difficult to judicially foresee how these cases, with the class and opt-out plaintiffs and thirty-seven defendants asserting cross-claims against each other, could be managed. Liberal use of severance would be required for trial, and that would lead to the consumption of courts' time in duplicative efforts. It seems to the court that a policy of allowing contribution would complicate litigation procedurally, frustrate settlements, and inhibit joint defense efforts to such an extent that this type of litigation would be virtually impossible to manage. Weighing the possible unfairness to a defendant such as Westvaco against the ills which would arise from contribution in such a case as this leads this court to the belief that contribution would be improper and undesirable. The court is also mindful of the arguments advanced by Judge Hanson in his dissent in *Professional Beauty Supply* that the problems attendant on such a rule would be likely to deter private plaintiffs from exercising their option to serve as private attorneys general in the antitrust area. 594 F.2d at 1189.
>
> 84 F.R.D. at 41.

Similarly, Judge Meanor in *Newark Motor Inn Corp. v. Holiday Inns, Inc.*, 1980-2 Trade Cas. 63,465 (D.N.J. 1980) observed that: "Implying a right to contribution has the potential for reordering the entire structure of antitrust litigation," which Judge Zirpoli in *El Camino*

Glass v. Sunglo Glass Co., 1977-1 Trade Cas. ¶ 61,533 (N.D. Cal. 1976) described as "already enormously complex."

Thus, in contrast with the Eighth Circuit's view, the district court bench appears to share the apprehensions, expressed by the Fifth Circuit in the instant case, that contribution "may open a Pandora's box of procedural problems, against which district court discretion may prove a palliation." 604 F.2d at 906. Respondents cannot say with any degree of certainty what is in that box, but here are a few of the readily foreseeable difficulties that would confront courts and counsel if contribution claims were permitted.

Defense Coordination

As a practical matter, coordinated defense efforts have become essential to processing modern complex antitrust litigation. The Manual for Complex Litigation recommends such coordination, and trial courts generally insist upon it. The existence of contribution claims would necessarily drastically reduce and probably eliminate altogether any coordinated joint defense efforts. Cross-claims could be filed by some or all defendants against all other defendants. Third-party claims could add new parties long after the original complaint was filed (as petitioner attempted to do here). Contribution complaints could even add additional claims or allegations, so long as such claims would reasonably fit within the plaintiff's complaint. *See, e.g., Getter v. R. G. Dickinson & Co.*, 366 F.Supp. 559 (S.D. Iowa 1973). In a multiparty antitrust case where

every party was adverse to every other party, the manageability problems brought on by the additional contribution pleadings, claims and discovery requests could reach nightmarish proportions during the pre-trial stage, and they would be even worse at trial.

The Innocent Defendant

The defendant who is guilty as Cain would never have a second thought about asserting a contribution claim; it would always be in his manifest best interest to do so. At the very least, contribution would lessen the impact of an adverse judgment by requiring him to pay only a portion of it. In some cases, like the one now before the Court, contribution could eliminate the effect of an adverse judgment altogether and even permit such a defendant to retain some of his illegal profits.

But contribution would place the innocent defendant in a real quandary. This is because virtually all antitrust cases are conspiracy cases, and the practical effect of a contribution claim in a conspiracy case is very different from its effect in, say, a negligence case. In a negligence case, there is at least no patent inconsistency in arguing to a jury that "I was not negligent; but if you should find that plaintiff's damages were caused by negligence, then a third party's negligence contributed to the damage and I am entitled to contribution from such third party." On the other hand, causation theory in antitrust conspiracy cases is founded upon a conscious concert of action between and among the co-conspirators. As Justice White explained in his concurring opinion in *Perma Life:*

> [A] third party proving an illegal undertaking between two defendants may recover for all damages caused by the combination. Those damages normally may be had from either or both defendants without regard to their relative responsibility for originating the combination or their different roles in effectuating its ends. This is because neither defendant, if he acted alone, could be charged with the violation; some degree of participation by both is essential to create a combination within the reach of section 1 of the Sherman Act. Either defendant is therefore deemed to have been a material cause of the damages, sufficient to permit a third party to recover.
>
> 392 U.S. at 144.

Because of this causation theory, a defendant who chooses to assert a contribution claim in an antitrust case would be faced with the prospect of having to present the following argument to a jury: "I did not combine and conspire with anyone to injure this plaintiff; but if you should find that I did, then I did it with A and B and C, who are in this thing as deep as I am, and I am entitled to contribution from them."

There can be no doubt that a jury would overlook the legal niceties of alternative pleading and conclude that the defendant must know whether he conspired and with whom he conspired, and if defendant thinks he is entitled to contribution from A and B and C, then he must have conspired with them in restraint of trade.

As a practical matter, then, the truly innocent defendant who wants to categorically and effectively maintain under oath that he did not conspire with anyone would have to forego making contribution claims, because they would inevitably undermine his credibility. The guilty defendant, on the other hand, would have no such qualms. He knows he will have to pay a judgment anyway, and contribution claims would reduce or even eradicate his exposure under Section 4 of the Clayton Act.

A contribution remedy would therefore be most frequently invoked by those least deserving of protection from the effects of treble damage awards.

Retrials

The Court in *Professional Beauty* suggested that severance could be used to deal with situations (such as that of the innocent defendant discussed above) where it would be undesirable to resolve cross-claims and third-party complaints in the same trial as the main demand. 594 F.2d at 1184-5. However, it must be remembered that basic due process prohibits anyone from being subjected to liability as the result of a judgment in an action to which he was not a party. So if a court should decide to sever third-party defendants for a separate trial of the contribution claims, such third-party defendants could not be bound by any judgment imposing liability in the original action.

In order to obtain contribution, the defendants in the original action would be forced to undertake a com-

plete retrial of the allegations of the original antitrust complaint — this time with themselves as plaintiffs — seeking to establish before a new jury that they were liable to the original plaintiffs, and that the third-party defendants were jointly liable for the same violations. *See* Floyd, *Contribution Among Antitrust Violators: A Question of Legal Process*, 1980-2 B.Y.U.L. Rev. (to be published in February 1981); W. Prosser, HANDBOOK OF THE LAW OF TORTS 309 (4th ed. 1971).

It is exceedingly unlikely that trial courts would be willing to use severance as a means of avoiding some of the problems contribution creates, when severance would result in duplicative retrials of complex antitrust actions. The recent case of *Newark Motor Inn Corp. v. Holiday Inns, Inc.*, 1980-2 Trade Cas. ¶ 63,465 (D.N.J. 1980), illustrates the disinclination of the district court bench to retry such massive litigation. In *Newark*, Holiday Inns, Inc. (HI) sought contribution from Newark Motor Inn Corp. (NMIC), based upon HI's payment of the entire judgment in a prior antitrust action. NMIC was never made a party to the prior action, but the court in that case found that HI had conspired with NMIC to deny the plaintiff a Holiday Inn franchise. The *Newark* court first held that there was no right of contribution among antitrust coconspirators, and then went on to make the following observation regarding retrial of the prior litigation:

> Finally, even if such a right existed in certain circumstances, I would not permit the assertion of the contribution remedy in this case. NMIC and its

principals were, at all times relevant to the antitrust case before Judge Garth, available and amenable to service of process. HI could have readily joined NMIC as a third party defendant in that case and asserted its contribution claim at that time. Having failed to do so, I would not permit HI to assert its claim in this case. To rule otherwise would result in relitigation of the same complicated case tried before Judge Garth. *No rational judicial system can tolerate manipulation of this sort.* Having made what appears to be a tactical or business decision to allow NMIC to stay out of the original antitrust case, HI should live with that decision.

¶ 63,465 at 76,458 (emphasis added).

The present burden of antitrust cases on the judiciary is a matter of such broad concern that Congress has recently passed legislation for the express purpose of expediting antitrust litigation. *See* Antitrust Procedural Improvements Act of 1980, S. 390, 96th Cong., 2d Sess. (1980). Successive retrials of antitrust cases, whether as a result of severance or the failure of plaintiffs to join some potentially liable parties in the original action, would increase the burden of such litigation to unacceptable levels.

Intentional Torts

Violations of the antitrust laws have traditionally been regarded as intentional torts. *See, e.g., Solomon v. Houston Corrugated Box Co.*, 526 F.2d 389, 392 n. 4 (5th Cir. 1976); *United States Dental Inst. v. American Ass'n of Ortho-*

dontists, 396 F.Supp. 565, 571 (N.D. Ill. 1975). There must be some consciousness of commitment to a common scheme, some concerted activity, before the defendants can be found liable. It has been noted that the very language in Section 1 of the Sherman Act suggests there cannot be an unintentional violation of the Act. Schwartz, Simpson & Arnold, *Contribution in Private Actions under the Federal Antitrust Laws*, 33 Sw. L. J. 799, 792-3 (1979); L. Sullivan, ANTITRUST 312 (1977).

However, there are *dicta* in both the *Professional Beauty* opinion and the opinion of the Fifth Circuit in the instant case that indicate there can be such a thing as an unintentional violation of the antitrust laws. *See* 594 F.2d at 1186, 1189 and 604 F.2d at 905. Such *dicta* appear to be contrary to this Court's observations in *United States v. United States Gypsum Co.*, 438 U.S. 422 (1978). During the course of analyzing burden of proof requirements in criminal antitrust cases, the Court in *Gypsum* identified "four possible levels of intent — purpose, knowledge, recklessness and negligence . . . ," and then went on to comment that "[i]n dealing with the kinds of business decisions upon which the antitrust laws focus, the concepts of recklessness and negligence have no place." 438 U.S. at 455.

Petitioner Texas Industries shunts aside the suggestion made in *Professional Beauty* that a distinction could be drawn between intentional and unintentional antitrust violations by noting that "it is difficult to come to

grips with a workable definition of intentional or unintentional within the antitrust context." Petitioner's Brief 28. That is certainly true as a general proposition. But there can be no question whatever about the appropriate classification for the violation charged in the instant case. The antitrust offense alleged here is a horizontal agreement among competitors to fix prices. Complaint ¶ ¶ 5.1 & 5.2, J.A. 5-6. Of all the recognized categories of offenses arising under the antitrust laws, none is more clearly an intentional tort than horizontal price-fixing.

Should this Court alter the established rules of federal common law to permit Texas Industries to assert contribution claims in this case, then there would be no legal or logical impediment to the assertion of contribution claims under the federal common law in *any* intentional tort situation — not just in antitrust cases. The doors of the federal courts would be thrown open to a potential flood of claims by all sorts of intentional wrongdoers seeking ways to reduce the burdens the law imposes upon them for their misconduct.

Apportionment of Liability

Even petitioner concedes any ruling by this Court making contribution available among antitrust coconspirators would have to be reconcilable with the principle that settlement in civil antitrust litigation is to be encouraged:

> A contribution rule should be formulated that w[illegible]

> not adversely affect settlements. Plaintiffs must know the value of what they are releasing and settling defendants must be relieved of any further liability.
>
> * * *
>
> Encouragement of fair settlements is, of course, an objective in all disputes, not just those under the antitrust laws. With contribution, all parties will know where they stand. . . .
>
> Petitioner's Brief 26-7 & 19.

However, formulating a rule that would allow the parties to "know where they stand" necessarily involves devising some mechanism for apportioning liability among coconspirators, and that presents a fundamental problem. Texas Industries first attempts to avoid confronting it by lamely suggesting that:

> The precise method of apportionment could, of course, be left to the courts to be determined on a case by case basis, consistent with all of the relevant factors.
>
> Petitioner's Brief 22-3.

But it is obvious that litigants could not "know where they stand" if apportionment were determined on a case by case basis, and petitioner wisely appears to abandon the suggestion almost as soon as it is made.

Petitioner then focuses on two possible apportionment schemes, one based on comparative fault and the other based on *per capita* or *pro rata* allocation of lia-

bility.[3] No mention is made in petitioner's brief of a third possibility, that of apportioning liability on the basis of sales to plaintiffs, which is the most popular of the apportionment algorithms proposed by the *amicus curiae* briefs filed in support of petitioner's position.

One indisputable fact emerges from examination of these three proposals: there is no ready solution to the apportionment problem. This simple fact is further evidence of the wisdom of the present rule barring contribution in antitrust cases.

Little need be said here about apportionment based upon comparative fault, since the parties before the Court agree that it would be unworkable. Texas Industries puts it this way in its brief:

> Conversely, division of contribution upon a concept such as comparative fault could be more difficult for a plaintiff, or defendant, to quantify, and thus more likely to present obstacles to settlement. In order to know just what was being released, plaintiffs would have to measure the relative culpabilities of the defendants, which would require substantial evidence, and might not be ascertainable until after the trial itself.
>
> Petitioner's Brief 27.

It is actually not surprising that Texas Industries takes such a dim view of comparative fault apportion-

---

3 Petitioner uses the terms *per capita* and *pro rata* interchangeably to mean division in equal parts.

ment. After all, the main demand in the case at bar will be tried to a jury. Complaint ¶ 11.1, J.A. 9. A jury would be likely to assign less importance to concepts of conspiracy theory than petitioner might like. Asked to render a decision based upon comparative fault, a jury could well conclude that since Texas Industries is the one that got all the money from plaintiff Abraham, Texas Industries should be the one to give it all back. Thus a comparative fault formula would be cold comfort to petitioner in this case.

On the other hand, *per capita* apportionment receives Texas Industries' enthusiastic endorsement since, as explained above, it would not only have the effect of relieving Texas Industries of any liability on the main demand against it, but would also actually allow Texas Industries to retain one quarter of any illegal profits it received.

However, the use of the arbitrary *per capita* formula for apportionment flatly contradicts the arguments for greater flexibility which petitioner advances in support of contribution itself. The *Professional Beauty* court was taken to task in a recent commentary for precisely this inconsistency:

> The court's choice of such a simplistic measure appears ironic in light of its rejection of administrative difficulties as a rationale for objecting to contribution. In fact, the court's major reasons for supporting contribution — fairness and equity — argue against the [*per capita*] measure.

Sellers, *Contribution in Antitrust Damage Actions*, 24 Vill. L. Rev. 829, 851-52 (1979).

Texas Industries does not deign to discuss apportionment according to sales to plaintiffs, the proposal endorsed by many of the *amicus curiae* briefs. That may be because such a rule has limited utility. Although it could be used in horizontal price-fixing cases, it could not be used in many other common antitrust cases, such as those involving claims of vertical restraints. Texas Industries may also be cognizant of the fact that apportionment according to sales to plaintiffs would entitle it to no recovery whatever on its third-party claims against respondents herein, since respondents never made any sales to the plaintiff.

In analyzing the apportionment problem, petitioner appears to have been impelled by logic and equity to the very solution that would offer it the greatest financial benefit. Of course, Texas Industries is not alone. For example, *amicus curiae* Olson Farms, Inc., applying no less logic than petitioner and striving for equity with no less vigor, concludes in its brief that apportionment should be made on the basis of sales to plaintiffs. Such a rule would peg its share of the total liability in the case of *Cackling Acres v. Olson Farms, Inc.*, 541 F.2d 242 (10th Cir. 1976), *cert. denied*, 429 U.S. 1122 (1977), at around 11% of the judgment. Under Texas Industries' *per capita* theory, however, Olson Farms would be liable for 20% of the judgment.

Other, similar examples can be drawn from the *amicus curiae* briefs. The differing positions taken in

these papers demonstrate that, insofar as apportionment is concerned, logic and equity are in the eyes of the beholder.

The wasteful litigation that creation of a contribution cause of action would spawn over this issue alone should be sufficient cause to deny petitioner's claim.

• • •

The foregoing compendium of problems that would arise out of creation of a contribution remedy is intended to be illustrative only. Because contribution cuts across so many facets of antitrust practice, ranging from its effects on the substantive law (its impact upon the statute of limitations, for example) to its effects on common procedures utilized in antitrust cases (it would probably end the practice of employing lead and liaison counsel), an exhaustive analysis of its potential repercussions is neither practical nor possible at this time. However, respondents submit that even just the most readily apparent practical consequences of creating a contribution cause of action constitute more than sufficient cause to reject the proposal. In *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977), this Court held that indirect purchasers did not have a cause of action under Section 4 of the Clayton Act in part because of complications in proof which would result in attempting to divide damages between direct and indirect purchasers. According to the Court, one reason indirect purchasers had to be denied a cause of action was because of "the costs to the judicial sys-

tem and the efficient enforcement of the antitrust laws" imposed by the "complexities and uncertainties" raised by their claims. 431 U.S. at 732, 740-45. As the above discussion illustrates, the complexities and costs which would be imposed upon the federal court system by contribution claims in antitrust cases would be overwhelming. Thus practical considerations as well as policy considerations clearly dictate retention of the rule against contribution.

III. Judicial Action to Create a Right of Contribution Among Coconspirators is Inappropriate

Practical litigation and policy considerations virtually mandate maintaining the rule against contribution in antitrust actions. Yet even if these considerations were nonexistent, deference to Congress on the issue of contribution is appropriate in actions brought under the antitrust laws.

Deference To Congress

Despite the existence of long-standing maritime contribution rules, this Court's admiralty cases support deference to Congress when contribution claims are asserted in cases involving parties whose rights, duties and liabilities have been aligned by statute. In *Halcyon Lines v. Haenn Ship Ceiling & Refitting Corp.*, 343 U.S. 282, 285 (1952), for example, this Court recognized that "[i]n the absence of legislation, courts exercising a common law jurisdiction have generally held that they cannot on their own initiative create an enforceable right

of contribution as between joint tortfeasors." The Court contrasted this position with maritime jurisdiction, where courts have felt freer to fashion such rights. 343 U.S. at 285.[4] Nonetheless, because legislation had been passed affecting the obligations of the contribution defendant to the plaintiff in admiralty, the Court held that Congress should determine whether to allow contribution against that defendant:

> We have concluded that it would be unwise to attempt to fashion new judicial rules of contribution and that the solution of this problem should await congressional action. Congress has already enacted much legislation in the area of maritime personal injuries. . . . We think that legislative consideration and action can best bring about a fair accommodation of the diverse but related interests of these groups.
>
> 342 U.S. at 285-86 (footnotes omitted).

The continuing vitality of the *Halcyon Lines* principle of deferring to Congress on contribution-related rules when legislation involving the parties' rights exists was reemphasized last year in *Edmonds v. Compagnie Generale Transatlantique*, 443 U.S. 256 (1979). There the Court dealt with a challenge to a rule regarding the

---

4 This Court has stated that "[a]dmiralty law is judge-made law," *Edmonds v. Compagnie Generale Transatlantique*, 443 U.S. 256, 259 (1979), and that "Congress has largely left to this Court the responsibility for fashioning the controlling rules of admiralty law." *United States v. Reliable Transfer Co.*, 421 U.S. 397, 409 (1975), *quoting from Fitzgerald v. United States Lines Co.*, 374 U.S. 16, 20 (1963).

method by which damages were divided in longshoremen's maritime tort suits. The case arose after the passage of legislation in which Congress had "aligned the rights and liabilities" of the parties involved in light of the preexisting admiralty rules. 443 U.S. at 272. This Court, citing *Halcyon Lines*, refused to change the existing rule because the proposed change might have disturbed the balance which Congress had struck in this area. 443 U.S. at 273.

The holdings in these cases support deference to Congress on contribution rights where legislation has been enacted, even in a court-made area of the law. This Court's precedent on the availability of causes of action in purely statutory contexts firmly supports such judicial deference.

Thus, for example, the absence of a statutory cause of action has been consistently fatal to causes of action sought by (i) persons who are not beneficiaries of the legislation involved, or (ii) beneficiaries of the legislation who are seeking a remedy other than the remedy implicitly or explicitly provided to them by the statute. *See, e.g., Transamerica Mortgage Advisors, Inc. v. Lewis*, 411 U.S. 11 (1979); *Piper Aircraft Co. v. Chris-Craft Industries, Inc.*, 430 U.S. 1 (1977). Here, petitioners are not seeking protection as beneficiaries of the antitrust laws, nor is the remedy in any way suggested by the language or legislative history of the antitrust laws. As this Court stated in *National Railroad Passenger Corp. v. National Association of Railroad Passengers*, 414 U.S. 453, 458 (1973):

> A frequently stated principle of statutory construction is that when legislation expressly provides a particular remedy or remedies, courts should not expand the coverage of the statute to subsume other remedies. . . . This principle of statutory construction reflects an ancient maxim — *expressio unius est exclusio alterius.*

As in these cases, the total absence of any legislative support for a cause of action for contribution in the antitrust laws or their legislative history requires rejection of petitioner's claim. One district court put it this way:

> Congress, aware of the rule against contribution, saw fit to provide for it explicitly in the securities statutes but not in the enforcement of antitrust laws which dominate so much of our litigation. . . . [N]o such right should be implied.
>
> *Sabre Shipping Corp. v. American President Lines, Ltd.*, 298 F.Supp. at 1345.

See also Olson Farms, Inc. v. Safeway Stores, Inc., 1979-2 Trade Cas. at 79,701; *Wilson P. Abraham Construction Corp. v. Texas Industries, Inc.*, 604 F.2d at 903. The absence of a cause of action for contribution in the antitrust laws and of any reference to such a cause of action in their legislative history requires rejection of petitioner's claim.

The Appropriate Forum

Congressional review of contribution in each statutory area is particularly appropriate because Con-

gress is far better equipped to address the issue. Judicial review of contribution under each statute would entail almost certain inconsistency in results and heavy judicial burdens. The many views and divergent interests on the important social and economic policies affected by contribution in antitrust cases could be fully explored only if legislative review takes place. Such an evaluation process is clearly the business of elected officials rather than of the courts. *See,* Friendly, *The Gap in Lawmaking — Judges Who Can't & Legislators Who Won't,* 63 Colum. L. Rev. 787, 791-92 (1963).

As this Court stated in *United States v. Topco Associates, Inc.,* 405 U.S. 596, 611 (1972), such delicate judgments should be left to Congress:

> To analyse, interpret, and evaluate the myriad of competing interests and the endless data that would surely be brought to bear on such decisions, and to make the delicate judgment on the relative values to society of competitive areas of the economy, the judgment of the elected representatives of the people is required.

The two courts of appeals which have rejected contribution claims since *Professional Beauty* have felt that this "complex policy thicket" is appropriately reviewed by Congress:

> Before entering such a complex policy thicket, but recognizing a possible exception in the case of an unintentional violator, we believe this court should await a clear signal, at least, from the legis-

lative branch of our government on the matter. Certainly, the Congress, assisted by the resources of the executive branch, is in a far superior and more appropriate position to gauge the impact on observance and enforcement of the antitrust laws from contribution and its various facets of implementation. In this regard, we consider it salutary that the overwhelming majority of states in which a right of contribution exists among joint tortfeasors have provided for such a right by statute.

Olson Farms, Inc. v. Safeway Stores, Inc., 1979-2 Trade Cas. at 79,704.

Those aggrieved by this decision always have recourse to Congress, a forum better suited to evaluation of the competing interests and policies involved.

Wilson P. Abraham Construction Corp. v. Texas Industries, Inc., 604 F.2d at 906.

Congress is in a position of decided advantage over the judiciary in determining whether to maintain the present rule barring contribution or to alter the rule and permit such contribution. No contribution action should be recognized in any antitrust case in the absence of a Congressional directive to do so.

CONCLUSION

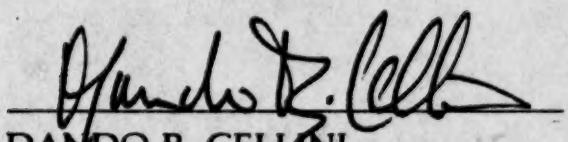
The Administrative Office of the United States Courts recently reported that there was an 18% increase in private antitrust filings during the twelve-month period ended June 30, 1980. CCH Trade Regu-

lation Reports Bulletin No. 462, November 3, 1980. This Court has often expressed its concern over the heavy burdens these cases impose on the federal court system. *See, e.g., Reiter v. Sonotone Corp.*, 442 U.S. 330, 344 (Burger, C.J.), 345-46 (Rehnquist, J. concurring) (1979). Attorney General Benjamin Civiletti has also observed that antitrust cases are too lengthy, too costly and too complicated. *See* Address by Attorney General Benjamin Civiletti, American Bar Association, Section of Litigation (Chicago, November 10, 1979). In view of the widespread consternation over the present level of complexity in antitrust litigation, the creation of a whole new class of claims cognizable under the antitrust laws ought to be considered only for the most compelling of reasons. No such reasons have been advanced in support of petitioner's request here to create a cause of action for contribution.

The review presented above of the equitable principles, policy issues and practical considerations that bear upon this matter demonstrates that petitioner's argument is woven of gossamer; it offers no sound support for the radical change petitioner advocates. Moreover, the very presentation of petitioner's request in a judicial forum is contrary to substantial precedent that calls for deference to Congress on the merits of contribution.

Accordingly, respondents Radcliff Materials, Inc., Jimco, Inc. and OKC Dredging, Inc. urge this Honorable Court to affirm the judgment of the Fifth Circuit Court of Appeals in this case, holding there is no right to contribution under the antitrust laws.

Respectfully submitted,



DANDO B. CELLINI
601 Poydras Street
New Orleans, Louisiana 70130
Telephone: (504) 586-1241
Counsel of Record for
Radcliff Materials, Inc.

JAMES A. BABST
1500 First National Bank of
Commerce Building
New Orleans, Louisiana 70112
Telephone: (504) 568-1320
Counsel of Record for
Jimco, Inc.

EWELL P. WALTHER, JR.
STEPHEN H. KUPPERMAN
1000 Whitney Bank Building
New Orleans, Louisiana 70130
Telephone: (504) 581-3200
Counsel of Record for
OKC Dredging, Inc.

January 16, 1981